

## **REMARKS**

This Amendment is filed in response to the Office Action dated March 12, 2004 in conjunction with a Request for Continued Examination. Claims 25 to 28 have been amended. Claims 18 to 24 and 33 to 36 stand withdrawn pursuant to the Office Action. A check in the amount of \$770.00 is enclosed herewith to cover the cost of the Request for Continued Examination. Applicant authorizes the charging of Deposit Account No. 02-1818 for any insufficiency or credit for any overpayment.

### **I. Information Disclosure Statements**

Applicant has filed the following Information Disclosure Statements:

- (a) Information Disclosure Statement on January 22, 2002;
- (b) Electronic Information Disclosure Statement on March 18, 2003; and
- (c) Second Supplemental Information Disclosure Statement on July 8, 2003.

As described in Applicant's December 11, 2003 Amendment to the September 15, 2003 Office Action, the Examiner has not yet acknowledged receipt or consideration of the January 22, 2002 or March 18, 2003 Information Disclosure Statements. Applicant respectfully requests consideration of the references cited in such statements. In the December 11, 2003 Amendment, Applicant enclosed copies of such Information Disclosure Statements and accompanying PTO Forms 1449 (without references).

### **II. Amendments to Overcome 35 U.S.C. §112 Rejection**

The Office Action rejected Claims 25 to 32 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The Office Action stated that, in Claim 25, Applicant recited that at least one end has a plurality of openings. The Office Action also stated that, in Claim 26, the openings are recited as being at opposite ends. Applicant has amended Claims 25 and 26 to overcome such rejection. Applicant respectfully submits that the such amendment overcomes the Office Action's rejection under 35 U.S.C. §112.

### **III. Patentability of Invention Over References Cited in 35 U.S.C. §103 Rejection**

The Office Action rejected Claims 25 to 30 and 32 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,979,694 to Bennett ("Bennett") in view of U.S. Patent No. 5,785,740 to Brugerolle et al. ("Brugerolle"). Applicant respectfully disagrees with and traverses this rejection for the reasons provided below.

Bennett discloses a pressure canister which includes a pressure relief valve and a quick disconnect outlet. The pressure canister holds hydride. The hydride in the canister produces hydrogen over time which builds up inside the canister. "The quick disconnect outlet 32 is used to draw out the hydrogen produced by the hydride contained within the body 12 of the canister 30. In the event that the pressure becomes excessive, the pressure relief valve 34 will vent the excessive hydrogen build up, to prevent damage to the canister 30, via the cross channel 39." (Bennett, Column 4, Lines 29 to 35). In operation, an article which receives the supply of gas from the canister, is connected to the O-ring (33). This article receives the hydrogen gas produced from the hydride material.

Bennett does not disclose, teach or suggest a gas inlet valve. The pressure relief valve (34) is an outlet valve which releases excess hydrogen from the canister. The quick disconnect outlet valve (32) is an outlet valve which draws off the hydrogen produced inside the canister. Neither of these valves are inlet valves or function as inlet valves.

Brugerolle discloses an adsorption module which adsorbs gaseous particles on the surface of an adsorbent material. The adsorption module includes an adsorber (A) having an inlet (1), outlet (2) and a reversible rotary machine (R). A shut-off valve (V) connects the outlet (2) to a storage (C). In operation, a mixture of gases is fed into the inlet (1), and the rotary machine (R) forces the gas mixture into the adsorber (A). The rotary machine (R) is cycled in different directions to separate the gases. One gas escapes at inlet (1) and the other gas escapes at outlet (2).

The Office Action stated that Brugerolle discloses "a rotatable member R, coupled to a connection member D, the rotatable member rotatable between: (i) an open position (when the openings in R part is blocking flow) which enables drink supply to flow from the body through the second opening; and (ii) a closed position (when the solid part is blocking flow) which blocks flow of drink supply from the body through the second opening."

Applicant respectfully submits that the reversible rotary machine (R) does not regulate the flow of drink supply. Rather, the reversible rotary machine (R) provides an alternating positive and negative pressure for the movement of gas. Also, the reversible rotary machine (R) does not have a closed position which blocks flow of drink supply. Upon review of Brugerolle, Applicant has been unable to find the features described by the Office Action. In particular, Applicant did not find any disclosure of the "R part" or the "solid part" described in the Office Action. In addition, Brugerolle does not disclose, teach or suggest a valve suitable for outletting drink supply.

Furthermore, the canister resulting from the combination of Bennett and Brugerolle would not function for the intended purpose of Applicant's invention. This is because such a canister would not hold or output drink supply. This canister would only operate to receive gas and output gas. For this reason alone, Applicant respectfully submits that this rejection is improper and should be withdrawn.

The Office Action also made the following rejection:

"Claims 25, 31 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Bennett et al. in view of Brugerolle et al. and further in view of Novitsky. The combination set forth above substantially claims the invention. However, Hardwick et al. fails to disclose a piercable sealing member, but Novitsky does disclose such a member 36. It would be obvious to modify Hardwick et al. to include such a piercable member at valve(s) 110 or 116 because the motivation for this would allow a reduction of parts."

It is not clear to Applicant what references are relied upon for this rejection. The Office Action states the Claims 25 and 31 are unpatentable over Bennett in view of Brugerolle and further in view of U.S. Patent No. 5,118,009 to Novitsky ("Novitsky"), but the Office Action goes on to discuss U.S. Patent No. 5,320,817 to Hardwick ("Hardwick") in this rejection. Applicant respectfully requests clarification of this rejection.

With respect to Novitsky, the Office Action states that Novitsky discloses a piercable sealing member (36). Applicant points out that Claim 31 calls for a gas inlet valve including a piercable sealing member. Applicant submits that Novitsky does not disclose, teach or suggest such a gas inlet valve. In Novitsky, gas flows from the canister, not into the canister.

For all of the reasons provided above, Applicant submits that Bennett, Brugerolle, Novitsky and Hardwick do not, alone or collectively, disclose, teach or suggest the invention defined by unamended Claims 25 to 32.

#### IV. **Improper Basis for Obviousness Rejection**

Applicant respectfully submits that the Office Action's rejections are improper and should be withdrawn for the reasons provided below.

##### A. **Brugerolle is Non-Analogous Art**

Applicant respectfully submits that the rejections based on the combination of Brugerolle with the above-identified references are improper because Brugerolle is non-analogous art. To determine whether a claim would have been obvious at the time of the invention, one must first determine the scope and content of the prior art. *Graham v. John Deere Company*, 383 U.S. 17, 148 U.S.P.Q. 459, 467 (1966). This determination is frequently couched in terms of whether the art is analogous or non-analogous (i.e., whether the art is too remote from the field of the invention to be treated as prior art). *In re Clay*, 966 F.2d 656, 658, 23 U.S.P.Q.2d 1058, 1060 (Fed. Cir. 1992).

Art is considered analogous to an invention when it is from: (1) the same field of invention; or (2) if it is reasonably pertinent to the particular problem to be solved. *Id.* A reference is "reasonably pertinent if, even though it may be in a different field from that of the inventor's endeavor, it is one which, because of the matter with which it deals, logically would have commanded itself to an inventor's attention in considering his problem". *Id.*

As mandated by the M.P.E.P:

The Examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue.

“In order to rely on a reference as a basis for rejection of an applicant’s invention, the reference must either be in the field of applicant’s endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned.” (See M.P.E.P. §2141.01(a)).

Brugerolle is non-analogous art under the first part of this legal test. Brugerolle is not in the same field as the presently claimed invention. The claimed invention is in the field of drink supply canisters for beverage dispensing apparatuses. In contrast, Brugerolle’s invention is in the field of adsorption used to separate gases. No plausible argument can be made that Brugerolle relates to a drink supply canister for a beverage dispensing apparatus. Under the first part of the test, Brugerolle is non-analogous art and can not be properly combined with the other references to render the claimed invention obvious.

Brugerolle is also non-analogous art under the second part of the legal test. Brugerolle would be analogous art to the present invention if it were reasonably pertinent to the particular problem solved by the present invention or it would have logically commanded itself to an inventor’s attention in considering this problem.

The problem to be solved by the present invention is set forth in the background section of the specification on pages 2 to 6. Part of this explanation of the problem is as follows:

Many households in the United States and throughout the world consume large volumes of beverages such as soft drinks, sodas, juices, lemonade, teas, isotonics, fruit drinks and other beverages on a daily basis. For instance, in 1998 retail sales of soft drinks in the United States were approximately 54 billion dollars, retail sales of fruit drinks in the United States were approximately 17.5 billion dollars and retail sales of isotonics in the United States were approximately 2.25 billion dollars.

Manufacturers in the beverage industry produce packaged beverages for consumers in the form of bottles, cans and cartons. They also produce liquid and powder beverage concentrates which require consumer preparation. Preparing beverages from concentrate by hand can be burdensome, time consuming and monotonous. Producing carbonated beverages from concentrate in

homes using known commercial equipment is impractical because special equipment and supplies are required. Such home mixed beverages are often of inconsistent quality and flavor.

For those who choose not to prepare beverages from concentrates, maintaining an adequate supply of packaged ready-to-drink beverages can be relatively burdensome for families which experience a large consumption of beverages. Beverage containers, consisting largely of water, are somewhat heavy, and such beverage containers occupy substantial space in refrigerators. In many families, at least once per week, family members stock their refrigerators with packaged beverages because of limited refrigerator space. The amount of available refrigerator space limits a family's supply of refrigerated ready-to-drink beverages.

Thus, the general problem the invention addresses is how to enable household members to conveniently dispense beverages from their refrigerators. A more specific problem the invention addresses is the need for enabling household members to conveniently stock their refrigerators with drink supply for the beverages.

Brugerolle does not address these general or specific problems. Brugerolle addresses adsorption used for gas separation purposes. Adsorption is principally used to address the problem of pollution and emission control. Adsorption has also been used to address the problem of separating gases, as is the case with Brugerolle. In this field, adsorption has been used for separation of gases or vapors from air based upon their adsorption isotherms being a function of total pressure, as well as vapor pressure and temperature. It is also used to separate pollutants from flue gases. It is respectfully submitted that Brugerolle is not reasonably pertinent to the general or the specific particular problems faced by Applicant. It is also respectfully submitted that Brugerolle would not have logically commanded itself to an Applicant's attention in considering these beverage-related problems. There is no plausible reason a person of skill in the art looking to solve such beverage-related problems would have looked for solutions in the adsorption field.

Accordingly, for the reasons provided above, Brugerolle does not satisfy either of the two legal tests for determining that it is analogous art. Thus, Brugerolle is legally non-analogous art and can not be properly combined with the other references to render the claimed invention obvious. For at least this reason alone, the rejections should be withdrawn.

**B. Brugerolle Can Only Be Relied Upon Using Improper Hindsight**

It is impermissible to use the claims as an instruction manual or template to piece together the teachings of the prior art to render a claimed invention obvious. *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570, 38 U.S.P.Q.2d 1551, 1554 (Fed. Cir. 1996). “Virtually all [inventions] are combinations of old elements.” *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457. An Examiner may often find every element of a claimed invention in the prior art. However, if “merely identifying each claimed element in the prior art was sufficient to negate patentability, very few patents would ever issue”. *Id.* Rejecting patent claims solely by finding “prior art corollaries” for the claimed elements permits an examiner to use the claimed invention itself as a blueprint for piecing elements in the prior art together. *Id.* To defeat the patentability of a patent application in this manner is inappropriate. Therefore, the Patent Office must show the “reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art” and combine those elements in the same manner as the claimed invention. *Id.* It is respectfully submitted that Brugerolle and Bennett do not include a general or specific motivation, suggestion or teaching for combining Bennett with Brugerolle as set forth in the Office Action.

A person of ordinary skill in the art would not be motivated to combine these references to achieve the claimed invention where there is no teaching or suggestion in either reference to

make such combinations. Furthermore, Applicant respectfully submits that such additional motivation or suggestion can only be derived from improper hindsight.

The M.P.E.P. mandates that impermissible hindsight must be avoided and the legal conclusion of obviousness must be reached on the basis of the facts gleaned from the prior art (See M.P.E.P. §2141.03). Although, as stated in case law often relied on by the U.S. Patent Office (See *e.g.*, paragraph A of subsection X of § 2145 of the M.P.E.P.), that “[a]ny judgment of obviousness is in a sense necessarily a reconstruction based on hindsight reasoning” *In re MacLaughlin* 443 F.2d 1392, 1395, 170 U.S.P.Q. 209, 212 (CCPA 1971), this nonetheless does not relieve the Patent Office of ensuring that the obviousness determination takes into account only knowledge which was with the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned from the applicant’s disclosure.

The Office Action does not state any proper legal reason why a person of ordinary skill in the art would be motivated to combine Bennett with Brugerolle. The Office Action states that it “would have been obvious to modify the canister in Bennett et al. to include the outlet valve of Brugerolle et al. having a rotatable member so as to top [sic] control the flow of material through the canister the motivation for which is the ease of movement of the rotary valve structure.” This reason for the motivation to combine the references is legally improper.

As discussed earlier, Bennett discloses a pressure canister which holds hydride. The canister includes a pressure relief valve (34) used to draw out the hydrogen which accumulates inside the canister. The pressure relief valve (34) functions as a vent that opens on its own when the internal pressure reaches a certain level. There would be no motivation, need or utility for connecting a rotatable member to this pressure relief valve. This is because the valve (34) is not intended to be actuated or engage with an actuator. Applicant submits that this structure,



function and intended purpose of Bennett teaches away from combining Brugerolle with Bennett in the manner of the Office Action.

For all of the reasons provided above, the rejections based on the combination of Brugerolle with the other references should be withdrawn.

**V. Claims 25 to 28 Have Been Clarified**

Claims 25 to 28 have been amended to more clearly define the invention.

Amended Claim 25 (and Claims 26 to 32 which depend therefrom) are directed to a pressurizable drink supply canister having, among other elements, a body adapted to hold a variable volume of a syrup drink supply under pressure. The body has a plurality of ends, and each of the ends defines at least one opening. The canister includes a gas inlet valve mounted to a first one of the ends of the body. The gas inlet valve is positioned at a first one of the openings. The gas inlet valve has: (a) an open position which enables pressurized gas to flow into the body and pressurize the syrup drink supply in the body; (b) a closed position which blocks flow of the pressurized gas from the body through the gas inlet valve; (c) a biasing member which predisposes the gas inlet valve to have the closed position; and (d) at least one member which, when actuated, causes the gas inlet valve to have the open position thereby causing the pressurized gas to pressurize the syrup drink supply. The canister also has a drink supply outlet valve having: (a) a connection member removably connected to a second one of the ends of the body, wherein the connection member is positioned at a second one of the openings; and (b) a rotatable member coupled to the connection member. The rotatable member is rotatable between: (i) an open position which enables the pressurized syrup drink supply to flow from the body through the second opening; and (ii) a closed position which blocks flow of the pressurized

syrup drink supply from the body through the second opening. For the reasons provided above, Applicant respectfully submits that Claims 25-32 are in condition for allowance.

Should the Examiner deem it advisable to conduct a telephone interview for any reason, please contact the undersigned.

Respectfully submitted,

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